No. 287.

Brf. of Peck, Cary & Hanson

Respondt

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Supreme Court of the United States

OCTOBER TERM, A. D. 1898

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vs.

THE CARR, RYDER & ENGLER COMPANY, *Respondent*.

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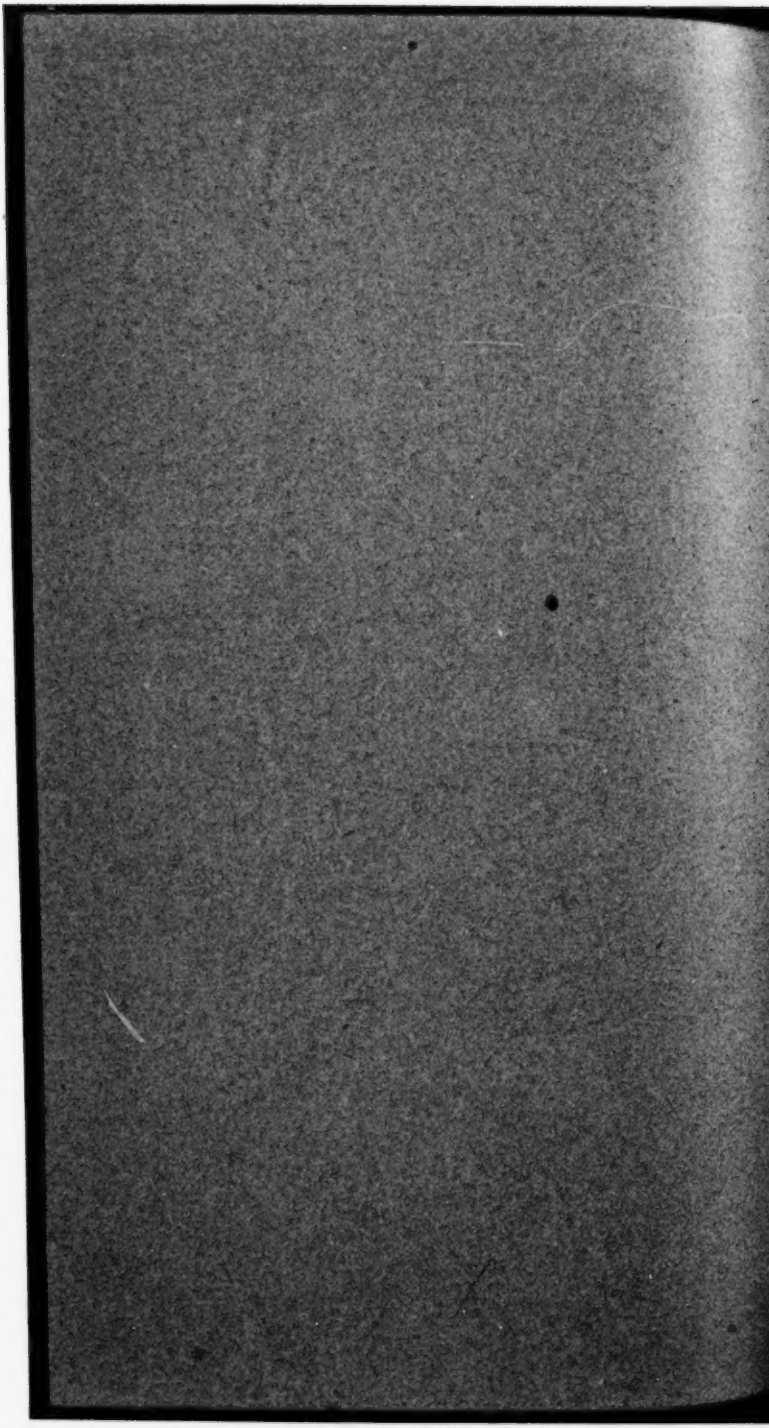
RESPONDENT'S BRIEF AND ARGUMENT.

GEO. R. PECK,
GEO. P. CARY,
SOLICITORS FOR RESPONDENT.

BURTON HANSON,
OF COUNSEL.

Sol Sydney Press Printing Company, 92 Dearborn St., Chicago.



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RESPONDENT'S BRIEF AND ARGUMENT.

This case arises out of the same fire that do the cases of the Chicago, Milwaukee and St. Paul Railway Company, the Huntting Elevator Company and Jacob Rau against said Bosworth, as Receiver, Nos. 283, 284 and 285, and which will be presented to this court at the same time that this cause is presented.

The question, what constitutes a delivery of freight in carload lots, as between connecting carriers, is involved in each of the cases. In this case the decision of a majority of the judges of the Circuit Court of Appeals was against the Receiver—Judge Showalter dissenting—while in the three cases above mentioned the decision of a ma-

jority of the judges was in favor of the Receiver—Judge Jenkins dissenting—Judges Woods and Showalter disagreeing, however, as to the grounds upon which their decisions were placed.

Respondent was a dealer in manufactured sash, door and blinds at Dubuque, Iowa. On the 24th day of October, 1894, it delivered to the Chicago, Milwaukee and St. Paul Railway Company at Dubuque a carload of manufactured articles consigned to the May & Thomas Hardware Company, Birmingham, Alabama, by way of East St. Louis. The car was a car of the Rock Island and Peoria Railway Company and was numbered 1,004. In due course of transportation this car containing this property came into the possession of the Receiver's Company at Peoria, and was by that company transported to East St. Louis, the terminus of its road, where on the 28th day of October its contents were damaged by fire, the amount of the damage being seven hundred seventy-seven and 28-100 dollars ($777.28). At East St. Louis the Receiver's Company had no terminal facilities of its own. It therefore contracted with the Terminal Railroad Association for the necessary yard room and tracks for handling its cars, such as making and breaking up its trains, and switch engines and crews for switching its cars to and from its main track and the tracks which it had the use of under its agreement with that Association. The contract will be found on page 100 of the Rau record. Upon the arrival of the train which brought the car in question to East St. Louis, it stopped at the end of the main track of the Receiver's Company, which was what is known in railroad parlance as a "Y" track. There it stood until a switch engine and crew of the Terminal Association coupled to

it and switched the cars, including the car in question, to some one or more of the tracks which the Receiver's Company used under its agreement with that Association. For this service the Receiver's Company paid the Terminal Association fifty cents for each car so switched. Now, the contention of counsel for the Receiver is that the act of the Terminal Association in switching this car from the Receiver's main track to the tracks which he used under his agreement with that Association constituted a delivery of the car and its contents to that Association, and that thereby and thereupon his liability as a carrier terminated. Circuit Judges Woods and Jenkins held that it did not constitute a delivery; that without the delivery of the customary way-bill containing the names of the consignor, consignee, route and destination and contents of the car, there could be no delivery of the car or its contents. And this for the reason that in the absence of the delivery of a way-bill, or of information that was its equivalent, there could not, under the circumstances, be a delivery of the car. And further, without such a way-bill the Terminal Association would have no reason to assume that the car was to be further handled or transported by it, nor would it know what the car contained, where it was destined, to whom it was to be delivered or the route by which it was to be transported. It is conceded that the way-bill for this car and its contents had not been delivered by the Receiver to the Terminal Association at the time of the fire. *It is likewise undisputed that the day after the fire the Receiver tendered the car and the way-bill therefor to the Terminal Association, and that Association declined to accept delivery by reason of the damaged condition of the car.*

Q. Take Rock Island and Peoria car numbered a thousand and four, loaded with sash, door and blinds; what was done with that after the fire?

A. *The agent of the Receiver of the C., P. & St. L. offered us a way-bill for the car,* BUT WE DECLINED IT.

Q. That was after the fire?

A. Yes, sir; the day following the fire. The car was then under THEIR INSTRUCTIONS placed for transfer opposite an empty car.

Q. Who placed it there?

A. The Terminal Association.

Q. At whose request?

A. Under the instructions of the agent of the Receiver of the C., P. & St. L.

Q. That service paid for?

A. Made a bill and sent it in to general office; presume it was paid. (Rau Rec., 80.)

There is likewise no dispute over the fact that the Receiver never treated a car as having been delivered to the Terminal Association until he had delivered the way-bill therefor to that Association. For, until he had delivered the way-bill, he did not report the delivery of the car to the company whose car had thereby been delivered. To illustrate: A car belonging to the Chicago, Milwaukee and St. Paul Railway Company would arrive at East St. Louis over the Receiver's road on the 20th day of October. It would immediately be switched, as was the car here in controversy, from the Receiver's main track to some one of the tracks which he had the use of under his agreement with the Terminal Association. There it would remain standing until the Receiver delivered to that Association the customary way-bill therefor, which might not be until a day or so afterwards. Thereupon and on the day of the delivery of the way-bill, and not until then, the Terminal Association would take the car out of the Receiver's portion of the yard and take it to its portion

of the yard, place it in a train and send it forward as directed by the way-bill. (Rau Rec., 74, 75.) And not until this was done did the Receiver notify the Chicago, Milwaukee and St. Paul Railway Company that he had on that day delivered its car to the Terminal Association. In other words, the Receiver did not report to the St. Paul Company that he had delivered its car to the Terminal Association at the time that Association switched it from his main track to his yard tracks, but did report such delivery when, and on the very day, he delivered the way-bill therefor, *and not until then.* This fact, in connection with the other fact that the Terminal Association never undertook to move or further transport cars that were standing in the Receiver's portion of the yard, which he used under his agreement with that Association, until it had received the way-bills therefor, proves conclusively that up to the time of the delivery of these way-bills the possession and control of the cars were with the Receiver, and not with the Terminal Association. As testified to by Felps, the agent of that Association:

"We had nothing to do with them at all until we received way-bills, if they stood there until doomsday." (Rau Rec., 78.)

The car in controversy, which belonged to the Rock Island and Peoria Railway Company and numbered 1,004, had not been reported by the Receiver as delivered to the Terminal Association up to the time of the fire.

But counsel contends that the Receiver having transported this car to the end of his rails, he was thereby discharged from all further obligation. There are two answers to this contention:

1. The end of Receiver's main track was not the end

of his rails. As between him and the respondent, his rails extended into the yards of the Terminal Association, so far as he had the use of the yard tracks of that Association under his agreement; and, as between him and the respondent, these yard tracks were his tracks, and the engine and crew which switched the car from his main tracks to these tracks were likewise his.

2. This car was consigned from Dubuque, Iowa, to Birmingham, Alabama. The Receiver came into possession of it as a connecting carrier. It was his duty to transport it to the end of his line of road and there deliver it to the next succeeding carrier (*Ry. Co.* v. *Jones*, 155 U. S., 333); and until he had dispossessed himself of the possession of the car and had invested the Terminal Association therewith, he held the car as a carrier. Now, he could neither divest himself of possession of the car, nor invest the Terminal Association therewith, until he had delivered to that Association the customary way-bill therefor. Until that was done he retained the absolute control and direction of the car, for the Terminal Association was without knowledge of the consignee, route, destination or contents of the car, and, therefore, was powerless to move the car or to forward it on to its destination. The situation is aptly stated by Judge Jenkins in his opinion:

"I have sought to show that there had been no delivery of these cars to the Terminal Association. It had not knowledge of their destination. It had not knowledge of the consignees of them. They were subject to the direction and control of the Receiver. The Terminal Association under its contract with the Receiver had placed these cars upon these tracks for the Receiver, and for a compensation agreed upon. It therein was the agent of the Receiver. It could not know whether these cars were to be transported over its line or the lines of the Wiggins

Ferry Company; it could not know in what direction they were to be transported or their ultimate destination. When it had placed the cars on these tracks pursuant to its contract with the Receiver, it had nothing further to do with them until the Roceiver had dispossessed himself of possession and control and had invested the Terminal Association therewith." (Rau Rec., 354.)

Counsel also argues that the Terminal Association in switching cars from the Receiver's main track to his yard tracks was acting as a connecting carrier. Nothing of the kind. It was performing a switching service for the Receiver, because the Receiver had no facilities of his own at that point. It did for the Receiver just what he would have done for himself had he owned the usual terminal and switching facilities. In doing this switching the Terminal Association did not undertake nor assume to receive possession of the cars as a connecting carrier. It was paid for this service which it rendered the Receiver fifty cents a car; and one carrier does not pay another carrier fifty cents a car or any other sum for the privilege of delivering cars to it for further transportation. The Receiver did not undertake to deliver cars to the Terminal Association, nor did that Association assume to accept delivery of cars from the Receiver for further transportation, unless such delivery was tendered by the delivery of the customary way-bill; for without that it could not forward them to their destination nor make deliverv of them to the consignee or next succeeding carrier, whichever the case might be.

Counsel also contends that the end of Receiver's main track, which he calls the "Y," was the designated place of delivery to the Terminal Association. This is not so. Receiver's train (for it was a train as it was left standing on this "Y" track) was not left there for the purpose

of making a delivery of it *there* to the Terminal Association—many of the cars would probably never be forwarded beyond East St. Louis—but was left there for the purpose of having the cars composing the train switched to the tracks which the Receiver had the use of under his agreement with that Association, there to remain until the Receiver was prepared to make delivery of them, either to the Terminal Association or to the Wiggins Ferry Company, at which time he would deliver the proper way-bill and thereby tender delivery of the cars. The claim of opposing counsel that where there is a designated place of deposit delivery is made by such deposit, applies only to package freight, where the packages are addressed the same as a postal envelope is addressed, or to exceptional cases where by local custom the placing of a car on a certain track by the delivering company is notice to the receiving company that such car is to be taken to a *certain* place and to a *certain* person. This is the equivalent of a way-bill. The case of *Missouri Pacific Railway Company* v. *Wichita Wholesale Grocery Co.*, 55 Kansas, 525, cited by opposing counsel, supports our position. There the Frisco Railroad Company had brought a carload of sugar to Wichita for the Grocery Company. The Missouri Pacific Company had constructed a spur track from one of its switch tracks along an alley to the rear of the building occupied by the Grocery Company. It was the practice of the Frisco Company, when it brought goods to Wichita which were to be delivered to the Grocery Company at its building, to place the cars upon the "Y" track which was the delivery track as between the Frisco and Missouri Pacific Companies, and then notify that company that the cars were on the "Y" to be placed on the spur

track, the track which led through the alley to the rear of the building occupied by the Grocery Company. Upon receiving this notice, the Missouri Pacific Company would take the car and switch it to the spur track at the rear of the building of the Grocery Company. This practice was followed in the case cited. The car of sugar was placed on the "Y" track and the agent of the Missouri Company notified by the agent of the Frisco Company that it had been placed there and that it was to be placed on the spur track at the rear of the building occupied by the Grocery Company. The Missouri Pacific Company then knew all that it was necessary to know in order to move the car to the place of delivery. This notice and custom took the place of the way-bill which is ordinarily used between connecting carriers. The court can readily see that had this notice not been given there would not have been a delivery of this car to the Missouri Pacific Company, although it had been placed on the "Y" track. It took the notice to complete the delivery. The court below held that the Missouri Pacific Company held this car as a connecting carrier, and it is difficult to see how it could have held otherwise, for it had received the car into its possession with instructions to haul it to a certain place on one of its tracks and there make delivery of it to the consignee. The Missouri Pacific Company, therefore, knew the consignee, place of delivery and the contents of the car. This case does not apply to the Carr, Ryder & Engler claim in the sense that opposing counsel are seeking to make the application. Here the purpose of the Terminal Association in switching the cars from the Receiver's main track to the tracks which he used under his agreement with that Association was not to accept a delivery of the cars, but was simply to break

up the Receiver's train and place his cars upon certain of the Receiver's tracks, there to remain until the Receiver was ready to make a delivery of them and give directions for their further transportation. In the meantime, and until these directions were given, the Terminal Association was in absolute ignorance of the consignee, the destination, the route and contents of the cars. This information was all with the Receiver, and until he passed it over to the Terminal Association, either by delivering the customary way-bill or in some other manner which was equivalent thereto, he had not dispossessed himself of the possession of the cars or their contents, nor invested the Terminal Association therewith. And until this was done his liability as a carrier continued.

The claim that the Terminal Association was content to haul such cars as the car in question from the "Y" track to the tracks where they stood until way-bills therefor were delivered to the Terminal Association and there hold them until it could get further shipping directions, does not meet the argument. The switching of these cars by the Terminal Association was not a matter of content. That Association did this work because it was under contract to do it. The Receiver employed this service because he was without facilities of his own. When the switch engine of the Terminal Association hitched to the cars on the "Y" track and took them to the tracks which the Receiver had the use of, it had no knowledge whether they were to be hauled further, whether they were to be forwarded to St. Louis or to points further on, or the places to which they were to be sent or the persons to whom they were to be delivered. All that it knew was that it was switching cars from the Receiver's main track to certain other

of his tracks, for which it received fifty cents a car. It knew the numbers and initials of the cars, nothing further. Not until the Receiver delivered to it the customary way-bill containing the needed information did it concern itself further with these cars. Not until then was there a delivery of these cars. Not until then did the Terminal Association become a carrier of these cars. Up to that time they were in the possession of the Receiver, subject to his control and direction, and whatever handling there was of them by the switch engines of the Terminal Association was done for the purpose of breaking up the Receiver's trains and placing the cars on tracks which he used for storing and handling his cars, for which he paid a stated amount for each car so handled, and not for the purpose of making a delivery of them to that Association. *The fact that the morning after the fire the Receiver tendered a way-bill for the car in question to the agent of the Terminal Association, and that agent, after inspecting the car, and finding that it and its contents had been damaged by the fire, declined to accept delivery, shows conclusively that the Receiver had not at the time of the fire even tendered delivery of the car, and that the Terminal Association had not accepted delivery of the car and would not until the way-bill had been received and the car named therein found to be in such condition as that it could be safely transported.* (Rau Rec., 80.) We therefore claim that at the time of the fire the car in question had not been delivered to the Terminal Association. It had not even been tendered to it, and therefore the Receiver is liable for the loss which the respondent company sustained.

It is also argued by counsel that under the terms of the contract under which the property

in question was being transported, that the Receiver is not liable because he was not "*actually*" in the possession of the property at the time of the fire, the claim being that the actual possession was with the Terminal Association. This claim, of course, is based on the assumption that the ownership of the track on which the car was standing at the time of the fire was in the Terminal Association, and, therefore, it held actual possession of the car. The answer to this claim is, that under the contract between the Receiver and the Terminal Association the tracks which he had the use of under such contract, as between him and the respondent, were his tracks, and the cars which he brought into East St. Louis and placed upon such tracks were his cars and were in his possession until he had divested himself of the possession thereof and had invested the Terminal Association therewith. The Receiver was in "actual" possession of this car, as much so as if he had owned the track on which it stood outright and the engine and crew which placed it there.

The attention of the court is called to our brief filed in the cases of the Chicago, Milwaukee and St. Paul Railway Company, the Huntting Elevator Company and Jacob Rau against C. H. Bosworth, the Receiver herein, which involve substantially the same questions as are involved in this case, and which will be submitted to this court at the same time that this case is submitted. In those cases the decrees of the Circuit Court, which were in favor of the parties above named, were reversed by the Circuit Court of Appeals by a divided court, Judges Woods and Showalter filing opinions reversing the decrees, while Judge Jenkins filed a dissenting opinion. In this case the decree of the Circuit Court was likewise in favor of the respondent, the Carr, Ryder & Engler Company, and was affirmed by

the Circuit Court of Appeals, Judges Woods and Jenkins filing opinions of affirmance, while Judge Showalter wrote a dissenting opinion. For opinions see Rau Rec., 340–364. The question involved in each one of these four cases is, whether there had been a delivery of the property in question to the Terminal Association at the time of the fire. If there had not been a delivery of the car and its contents in the Carr, Ryder & Engler case, as a majority of the judges of the Circuit Court of Appeals held that there had not been, then there had not been a delivery of the cars and their contents in the three cases above named; for the essential facts, so far as they relate to the question of delivery, are the same in all of the cases. That the decision of the majority of the court below is right in the Carr, Ryder & Engler case and wrong in the three other cases there can be no question.

In Conclusion.

The fact that the day after the fire the agent of the Receiver tendered the car in question, being Rock Island and Peoria Railroad Company car No. 1,004, to the Terminal Association, by offering a way-bill therefor; that that Association declined to receive it, and that thereupon such car, under the instructions of the Receiver, was placed opposite an empty car for the purpose of transferring the damaged sash, doors and blinds into such empty car, and that the Receiver paid the Terminal Association for that service, is conclusive proof that there had been no delivery of the car and its contents to the Terminal Association before the fire, and that the Receiver held possession of it, and regarded himself as being in possession of it at the time of the fire.

The following testimony given by Mr. Felps, the agent of the Terminal Association at East St. Louis, which testimony is uncontradicted, is more potent than argument of counsel or citation of authority, and renders both unnecessary:

"Q. Take Rock Island and Peoria car number a thousand and four, loaded with sash, doors and blinds; *what was done with that after the fire?*

A. *The agent of the Receiver of the C., P. and St. L. offered us a way-bill for the car, but we declined it.*

Q. *That was after the fire?*

A. *Yes, sir; the day following the fire; the car was then under their instructions placed for transfer opposite an empty car.*

Q. Who placed it there?

A. The Terminal Association.

Q. At whose request?

A. Under the instructions of the agent of the Receiver of the C., P. & St. L.

Q. That service paid for?

A. Made a bill and sent it into general office; presume it was paid." (Rau Rec., 80.)

Respectfully submitted.

GEO. R. PECK,
GEO. P. CARY,
Solicitors for Respondent.

BURTON HANSON,
Of Counsel.